Supreme Court, U. S.
FILED
OCT 16 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply of Petitioners to Brief of the United States as Amicus Curiae

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On Saturday, October 12, 1974, we received through the mail in the form of corrected page proof a "Brief for the United States as Amicus Curiae". We think this to be untimely under the Court's Rule 42(2), for respondents' brief was due on August 9, 1974, and filed about August 9, and the oral argument is scheduled for October 21. This late filing deprives us of adequate time to reply.

The government does not discuss the questions on which the Writ was granted and does not seek to sustain the reasoning on which the court below rested its decision. The government's

argument is that the terms "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act are the equivalent of "affect commerce" and thus concurrent with the reach of the Sherman Act.

But the government confines itself to Sections 3 and 7 of the Clayton Act *and noticeably avoids applying the argument about the Robinson-Patman Act.** Yet the terms "engaged in commerce" and "in the course of such commerce" are identical in Section 3, in Robinson-Patman, and in Section 2 of Clayton, of which Robinson-Patman is an amendment. As Sections 2 and 3 were enacted at the same time, in 1914, the commerce provisions have the same meaning. We quote them side by side:

Sec. 2. (38 Stat. 730; 15 USCA, sec. 13.)

That it shall be unlawful for *any person engaged in commerce, in the course of such commerce,* either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:*

Sec. 3. (38 Stat. 731; 15 USCA, sec. 14.)

That it shall be unlawful *for any person engaged in commerce, in the course of such commerce,* to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease,* sale, or contract for sale or such condition, agreement or understanding *may be to substantially lessen competition or tend to create a monopoly in any line of commerce."*

All emphasis in quotations is added.

*The Robinson-Patman Act is not a favorite of the Antitrust Division of the Department of Justice.

Not only are the terms in Sections 2 and 3 the same, but each adds another requirement, that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce." If the words "engaged in commerce" and "in the course of commerce" in Section 3 meant what the government contends, they would be pure surplusage, for they would already be totally encompassed in the "effect" clause.

Furthermore, if the terms "engaged in commerce" and "in the course of such commerce" mean what the government now claims, the lengthy discussion about Section 3 in *Standard Oil Company of California v. United States,* 337 U.S. 293 (1949) would have been unnecessary.

The 1950 amendments to Section 7 of the Clayton Act made no change in the commerce provisions of Section 7, and they ran *pari passu* with Sections 2 and 3, viz.:

"Sec. 7. (38 Stat. 731; 15 USCA, sec. 18.)

"That no corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation *engaged also in commerce, where the effect* of such acquisition *may be to substantially lessen competition* between the corporation whose stock is so acquired and the corporation making the acquisition, *or to restrain such commerce* in any section or community, or tend to create a monopoly *of any line of commerce."*

Here again, if the words "engaged in commerce" meant what the government now asserts, they were surplusage for they would have already been contained in the "effect" clauses and certainly in the words "to restrain commerce" which read like the Sherman Act.

These sections cannot rationally be read in any way other than as requiring (1) *not only* that the activities substantially affect or restrain interstate commerce, *but also* (2) that they or the parties be "engaged in commerce". The government's new revelation of what these sections mean not only rewrites them but deletes from them the significant terms entirely.

The other arguments of the government are similar to some made in respondents' brief. With the limited time for reply, we adopt as further reply the discussion at pp. 8 through 20 of the "Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.," filed on October 5, 1974. Inasmuch as respondents applied to the Robinson-Patman Act the same arguments that the government applies only to Sections 3 and 7 of the Clayton Act, a major portion of the discussion we adopt is to be found in the discussion in our reply brief above of the Robinson-Patman Act.

CONCLUSION

We respectfully submit that Sections 3 and 7 of the Clayton Act cannot bear the interpretation the government's amicus brief would force upon them.

Dated: San Francisco, California, October 15, 1974.

Respectfully submitted,

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APPENDIX A.

Order.

Original Filed May 31, 1972, Clerk, U.S. Dist. Court, San Francisco.

United States District Court, Northern District of California, Master File, No. 50173-RES, No. C-71-608-RES.

In Re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases.

This Document Relates to: Copp Paving Company, Inc., et al., Plaintiffs, v. Gulf Oil Corporation, et al., Defendants.

This is one of the Western Liquid Asphalt cases.[1] Plaintiffs seek damages and injunctive relief for anti-trust law violations alleged to have been committed by the defendants in the sale and marketing of liquid asphalt and asphaltic concrete. The complaint alleges in a first claim:

1. Price fixing and a monopoly in the sale and marketing of liquid asphalt and asphaltic concrete. 15 U.S.C. §§ 1 and 2.

2. Discrimination against plaintiffs by reason of price and credit concessions to some customers and sales to plaintiffs' competitors at unreasonably low prices. 15 U.S.C. § 13(a).

3. Unlawful exaction from customers of agreements not to use or deal in plaintiffs' products and services. 15 U.S.C. § 14.

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[1]Pursuant to 28 U.S.C. § 1407 the cases were transferred to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings. *See In re Western Liquid Asphalt*, 303 F.Supp. 1053 (J.P.M.L. 1969); *In re Western Liquid Asphalt*, 309 F.Supp. 157 (J.P.M.L. 1970).

4. Acquisition of stock, lessening competition and tending to create a monopoly. 15 U.S.C. § 18.

The second claim is substantially similar to the first except that it charges the violations under the California Cartwright Act (California Business and Professions Code § 16720).

Defendants by a series of motions seek to eliminate from this case the issues which are not common to the remainder of the Western Liquid Asphalt litigation. The court has heretofore stayed the discovery particular to this case and has ordered discovery to disclose the court's subject matter jurisdiction as to the asphaltic concrete issues.

I have assumed for the purposes of this order that the plaintiffs have proved all that they could as to the interstate character of their claim. In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, and plaintiffs made no request to enlarge the time allowed for that discovery. While in this day of notice pleadings and liberal discovery a plaintiff may initiate a case with no more than hope that his discovery will unearth something, I have acted on the premise that before parties should be required to submit to a burdensome discovery on the merits the facts supporting the jurisdiction of the court should be disclosed.

Liquid asphalt is a by-product of the refining of petroleum. It is extensively used in connection with the

construction and repairing of road and highway and other surfaces. Liquid asphalt does move in interstate commerce.

Asphaltic concrete is made by combining aggregates, fillers, and hot liquid asphalt in a hot plant operated at temperatures of approximately 375°F. The asphaltic concrete is discharged into a dump truck and delivered to the job, where it is placed at a temperature of about 275°F.

The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiffs' business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California. A more than de minimis quantity of the asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways.

While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregate used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.

The jurisdictional problem must be solved by examining the facts under the "in commerce" and the "affecting commerce" theories. *Yellow Cab Company of Nevada v. C. A. Christmas, et al.*, No. 25,567 (9th Cir. Mar. 1, 1972).

As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here. Hence none of the acts charged to the defendants affect in any way the interstate movement of asphaltic concrete. Plaintiffs contend, however, that the use of the asphaltic concrete in the interstate highways puts it "in commerce" within the meaning of the Sherman Act. Plaintiffs point to the authorizing language in the Federal-Aid Highway Act (23 U.S.C. § 101(b)) which expressly relates the interstate highways to interstate commerce, to 23 U.S.C. § 113, which expressly subjects interstate projects to the terms of the Davis-Bacon Act (40 U.S.C.A. §§ 276(a) *et seq.*), to *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) holding that vehicular roads are instrumentalities of interstate commerce and that persons repairing them are "engaged in commerce" within the scope of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), and to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), holding that persons locally employed producing amesite for local use in an interstate highway are engaged in the "production of goods for commerce" and for that reason are protected by Section 7(a) of the Fair Labor Standards Act (29 U.S.C.A. § 207(a)). The conclusion which plaintiffs draw from these authorities is that since interstate highways are in commerce parties supplying materials for the repair and construction of them are likewise in commerce and that there is jurisdiction under the Sherman Act.

Word meanings found in one legally regulated area may[2] or may not[3] be useful in determining the word

[2]*Overstreet v. North Shore Corp., supra.*

[3]*Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

meanings to be used in another. The Sherman Act forbids conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In providing guidelines for the interpretation of the Act courts have used the terms "in commerce" and "affecting commerce."

Both the language[4] of the decisions under the Sherman Act and the results reached by them indicate that the words "in commerce" are used in connection with local acts which do in fact affect in any degree the flow of interstate commerce. Thus in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant's acts were designed to shut down a radio station doing an interstate business. In *United States v. Bensinger Company*, 430 F.2d 584 (8th Cir. 1970), the defendant conspired to fix the price of a single dishwasher which was itself in interstate commerce. In *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, the evidence showed that as a result of the alleged conspiracy plumbers refused to work for a foreign plumber using imported fixtures.

On the other hand if the local act, though done in a business which is in interstate commerce, does not affect the flow of such commerce, then the "in commerce" theory is not satisfied. Thus in *Yellow Cab Company of Nevada v. C. A. Christmas, supra*, the court quoted with approval from *Page v. Work, supra*, as follows:

> The record is clear that appellee newspapers and Consolidated were engaged in interstate com-

[4]*Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954); *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961); and *Yellow Cab Co. of Nevada v. C. A. Christmas, supra.*

merce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few-out-of-state subscribers.[5]

Yet, since the conspiracy related solely to local advertising, the court held that the defendant's activities did not affect the flow of commerce. I conclude that the plaintiffs' position cannot be maintained on the "in commerce" theory.

The question—Did the defendants' local activities substantially affect commerce?—remains.

Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order it is assumed, that Sully-Miller and Industrial Asphalt, Inc. are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect

[5]It is noted that these activities are sufficient to put a newspaper in interstate commerce for the purpose of the National Labor Relations Act (*Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937)), and the Fair Labor Standards Act (*Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir. 1944), and *McComb v. Dessau*, 89 F.Supp. 295 (S.D. Cal. 1950)).

to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968).

As indicated, liquid asphalt does move in interstate commerce although the asphalt used by plaintiffs and defendants here was produced in California. It is possible as in *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, that the agreement to divide an intrastate market for products moving in interstate commerce can affect commerce. It is sufficient here to say that plaintiffs do not suggest a theory (much less support it) by which a division of an intrastate market for asphaltic concrete produced from local liquid asphalt could affect the interstate market in liquid asphalt.

I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce.

I conclude that the court should not, if it could, accept jurisdiction of the disputes as to the asphaltic concrete under the California law as pendent to the court's jurisdiction of the liquid asphalt claims. The issues differ not only because of the difference in the product involved but because of the difference in the nature of the cases. The case as to liquid asphalt is an action by a consumer seeking to recover damages caused by an alleged conspiracy to fix prices. To the extent that plaintiffs seek that relief their case remains. The issues raised as to the various methods of unfair competition practiced by the defendants in connection

with asphaltic concrete are not common to the liquid asphalt claims—they require a consideration of different facts and different laws. It is not in the interest of the expeditious treatment of these cases to add any extraneous issues to the massive and complex liquid asphalt litigation.

The defendant Sully-Miller neither produces nor markets liquid asphalt and does no interstate business of any kind.

IT IS THEREFORE ORDERED:

1. As to defendant Sully-Miller Contracting Company:

That there being no issue of material fact as to the defendant Sully-Miller Contracting Company its motion for summary judgment should be and is hereby granted and the plaintiffs are denied all relief.

2. As to the remaining defendants:

All discovery and further proceedings herein shall be limited to the following issues: (a) With respect to liquid asphalt whether said defendants, or any of them, violated 15 U.S.C. §§ 1, 2, 3, 13(a), 14 or 18, and if so (b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

3. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.*:

(a) Any claims that defendants, or any of them, violated 15 U.S.C. §§ 1 or 2 in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated 15 U.S.C. § 13(a) in connection with the marketing of asphaltic concrete;

(c) Any claims that defendants, or any of them, violated 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(d) The claim that defendant Union Oil Company of California violated 15 U.S.C. § 18 by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Section 16720 of the California Business and Professions Code with respect to asphaltic concrete.

I am of the opinion that the orders made herein and each of them involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders may materially advance the ultimate termination of the litigation.

DATED this 29th day of May, 1972.

/s/ RUSSELL E. SMITH
United States District Judge

Service of the within and receipt of a copy thereof is hereby admitted this.....day of August, A.D. 1974.

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